IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

NO. 486

NATIONAL LABOR RELATIONS BOARD

Petitioner

vs.

TRUITT MANUFACTURING COMPANY

Respondent

On Writ of Certiorari To The United States Court of Appeals For The Fourth Circuit

BRIEF FOR THE RESPONDENT

R. D. DOUGLAS, JR.
Southeastern Building
Greensboro, North Carolina

WHITEFORD S. BLAKENEY
Johnston Building
Charlotte, North Carolina

Attorneys for the Respondent

Of Counsel:
DOUGLAS, DOUGLAS AND RAVENEL
Greensboro, North Carolina

BLAKENEY AND ALEXANDER
Charlotte, North Carolina

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BRIEF FOR THE RESPONDENT

Question Presented

In negotiating upon a demand for a wage increase, if an employer bargains in good faith, is he nevertheless, *as a matter of law*, in violation of the National Labor Relations Act because he refuses to open his financial records to the Union representing his employees?

Expressed otherwise and in the terms of this case, the question is:—Though it is not questioned that the employer here bargained "with an open and fair mind" and "with a sincere desire to reach an agreement," should this Court nevertheless overrule the Court below and hold that the employer violated the law because it refused to furnish the Union with "full and complete information" as to its "capitalization," its "sales," "its costs," its "manufacturing costs," "its cost and price structure upon which its competitive bidding was computed," its "profits," "its profit in regard to sales and costs," its "dividends" and its "financial standing"?

Summary of Argument

The issue presented by this case arose out of a wage negotiation between the Respondent and a Union representing the Respondent's employees. It is undisputed that throughout such negotiation the Respondent bargained "with an open and fair mind and a sincere purpose to find a basis of agreement."

Nevertheless, the National Labor Relations Board asks this Court to rule that the Respondent "refused to bargain" with the Union, in that, and solely in that, the Respondent declined to furnish its financial records to the Union during the negotiation. The Board's contention is that in a wage negotiation, no matter that an employer otherwise bargains in complete good faith, it is automatically and *per se* a refusal to bargain, and therefore

a violation of the National Labor Relations Act, for the employer to refuse the Union access to its books and records.

There is, however, no authority of law or logic for such contention. Once it is established, as it admittedly is here, that an employer is negotiating in genuine and bona fide effort to reach agreement, then it may not be held that he is in violation of the law because he refuses to agree to any particular proposal or request. Not only have the Courts always so held in construing and applying the original bargaining requirement of the National Labor Relations Act[1] but the 1947 Amendments of the Act explicitly enunicate this proposition.[2]

After developing these fundamental features of the case the argument of this brief turns to discussion of the scope and implication of the ruling which the Board is asking the Court to approve. It is shown that such ruling encompasses virtually all of the financial and business records of the employer, yet is a ruling compelling disclosure simply for disclosures sake, without leading to any ultimately enforcible result or consequence.

Finally, the arguments advanced by the Board are analyzed to demonstrate that the position of the Board is completely lacking in any sound support, either of reason or authority.

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[1] 29 U. S. C. 158 (a) (5).

[2] 29 U. S. C. 158 (d).

Argument

Preliminary Statement

The question here at issue is one of far-reaching importance. The case is, moreover, one of first impression. No court has yet made the ruling which the National Labor Relations Board now asks this Court to make.

With this case the Board asks this Court to place the seal of law upon the long-sought aim of labor Unions "to look at the books" of American industry. The Board here asks the Court to hold that when a Union representative demands the financial records of an employer, he speaks with the voice of authority and his demand must, *as a matter of law*, be obeyed—good faith bargaining on the part of the employer notwithstanding.

The Respondent respectfully submits that the Court should make no such declaration of law. As was well expressed by Chief Judge Parker in rendering the unanimous opinion of the Court below:

> "We feel sure that it was never intended that the employer be required to disclose such information to its employees as an incident of collective bargaining; and we feel equally sure that Congress never would have passed a statute which it thought could have been given such interpretation."
>
> *National Labor Relations Board vs. Truitt Manufacturing Company*, 224 F 2d 869, 874 (C. A. 4)

The Bargaining Between the Company and the Union

In 1951, 1952 and 1953 the Respondent negotiated and entered into three successive contracts with the International Association of Bridge, Structural and Ornamental Ironworkers of America, AFL, as representative of Respondent's employees (R. 71). In the Summer of 1953, although a contract was is effect, the Union, under a clause permitting "reopening" on wage matters only, made demand for a 10¢ an hour wage increase (R. 1, 2). Representatives of the Company and of the Union met and negotiated with respect to this matter. The Company offering a 2½¢ an hour increase (R. 2). The Union insisted upon 10¢ and called the employees out on a strike (R. 9 and Petition p. 3).

After the strike ended, the Union renewed its demand for a 10¢ an hour increase. The Company again refused but proceeded to put into effect the 2½¢ raise which it had been offering (R. 77-78).

On September 2 the Union, by letter and for the first time, requested "permission to have a certified public accountant examine (the Company's) books, records, financial data, etc. to ascertain or substantiate the Company's position" (R. 1-2). The Company wrote in reply, reviewing the considerations which had impelled it to refuse the 10¢ wage increase, and declining to grant the Union access to its "confidential financial information," saying at the same time, however, "we will be glad at any time to show you our books and records regarding the

wages we pay to our employees whom you represent, although we think you have this information already." (R. 3-4).

Thereupon the Union again wrote the Company, requesting "full and complete information with respect to (the Company's) financial standing and profits during the past few years" and "full and complete information and evidence of (the Company's) financial status to substantiate its claim, including bona fide evidence as to dividends paid by the Company during the past ten years and the breakdown of its manufacturing costs" (R. 4-6). To this the Company replied "our refusal to grant your demanded wage increase was based primarily on what such a raise would do to our competitive position in the industry in this area. The Truitt Company is willing to discuss with you at any time the problem of how our wages compare with those of our competition." The Company again declined to furnish the Union with information as to its "financial status" (R. 6-7).

The Board ruled that such refusal on the part of the Respondent was *per se* and in and of itself a violation of law regardless of whether the Respondent was otherwise bargaining in complete good faith. The Board has never made any contention that there is any fault to be found anywhere in the Respondent's attitude or conduct, save in this one respect (R. 71). Indeed, after the exchange of correspondence outlined above, the parties resumed their bargaining meetings (Transcript 20-23) and later arrived at a settlement of their wage dispute.

The consideration principally stressed by the Company during the negotiations was its fear of getting its wages out of line with those of its competitors. It is undisputed that the Company stated that it was "already paying more than (its) competitors in the area" and that it named several such competitors (R. 72).

The Union's representatives who conducted the negotiations on behalf of the Union, and who were the Board's witnesses at the hearing before the Board's Trial Examiner, testified that "the Company stood firm on its position that (it) was already paying more than (its competitors)" (R. 74-75); that the Company made "explanation there that if they gave more, then it would put them in a position where they would not be able to get jobs" (R. 74-75) and "would price (the Company) out of competitive bidding" (R. 79, 84); that the Company "gave (the Union) exact names and figures and prices of jobs that (it) had lost because (it) had been underbid" (R. 75, 79-80); and that the Union never asked for any further substantiation of the Company's contention that "it was already paying more than its competitors" (R. 74). Similarily, the Company's Vice-President testified (R. 86-87):

> "Q. And what evidence did you offer to show the Union?
>
> A. We had statements from various firms, Peden Steel, Davie Steel, Carolina Steel . . . We had type-written lists of the wage rates that each was paying

and general rough classifications . . . We had evidence to show that we were paying actually higher rates than all but one of these, the one being Carolina Steel, with which we were right on par; and I might add, needless to say, they are our chief competition."

Thus the situation was one in which the Company, having basically demonstrated its good faith in dealing with the Union, having repeatedly entered into contracts with the Union, and being on the occasion in question engaged in bargaining with respect to a wage increase, (1) offered all its wage records to the Union, (2) offered and gave a part of the requested wage increase, (3) stated that out of economic considerations it would not agree to any further increase, (4) explained that outstanding among such economic considerations was its belief that it was already paying as much or more than its competitors and that if it went further beyond them, it would price itself out of its market, and (5) furnished statistical data and details to corroborate its position that its wages were already as high or higher than its competitors and that it was being underbid by them—and refused only to give the Union "full and complete information" as to its "financial status," "dividends," "manufacturing costs" and the like.

Upon this undisputed state of facts the Board asked the Court below to rule that by the Respondent's refusal to furnish such information, the good faith bargaining, which the Respondent was otherwise admittedly engaged

in, became, *as a matter of law,* transformed into bad faith bargaining, violative of the National Labor Relations Act. The Court below having refused to make such a ruling, the Board now asks this Court to do so.

The Undisputed Facts Establish that the Company Bargained in Good Faith and was Therefore Not in Violation of the Statute

Before analyzing the extraordinary implications of the ruling which the Board seeks in this case, the Respondent would respectfully call attention to the basic standard which governs the determination of good faith bargaining.

The law which the Board claims the Respondent has violated is, of course, the National Labor Relations Act and specifically that provision of the Act which makes it unlawful for an employer "to refuse to bargain collectively with the representatives of his employees."[3]

This succinct enactment has been uniformly held to require that when an employer bargains collectively with the representative of his employees, he shall bargain in good faith. In adjudging whether an employer has bargained in good faith, the guiding principle has always been that he must "enter into discussion with an open and fair mind and a sincere purpose to find a basis of agreement touching wages, hours and conditions of em-

[3] 29 U. S. C. 158 (a) (5).

ployment." *Globe Cotton Mills vs. National Labor Relations Board*, 103 F 2d 91, 94 (C. A. 5).

The test of failure to bargain is whether in the light of all the facts and circumstances established by the evidence, it is to be seen that such "open and fair mind" and "sincere purpose" to reach agreement have been lacking. In this case the Board does not question that the Respondent had such mind and purpose and made bona fide effort to reach agreement. As stated by the Court below, "there can be no question but that the Company here was bargaining in this spirit."

The Board simply contends that the single fact of Respondent's refusal to furnish its financial records to the Union *negatives all good faith otherwise established and in and of itself constitutes bad faith and violation of the statutory directive.*

It has never been the law, however, that adherence to a position taken on any given matter or a particular refusal or insistence constitutes in and of itself bad faith. If this were not sufficiently clear from the basic principle outlined above, it is certainly seen to be so when one considers the fact that the National Labor Relations Act expressly and positively provides that good faith bargaining involves no obligation "to agree to a proposal" or make "a concession."[4] Nevertheless, the Board seeks to have this Court rule, directly in the teeth of this provision, that there was, *as a matter of law,*

[4] 29 U. S. C. 158 (d).

an absolute duty on the part of the Respondent, "to agree to a proposal" and make "a concession," namely the drastic proposal and the vital concession of the Company's delivering its financial records to the Union.

In the National Labor Relations Act Congress has in effect said: We require only that the employer and the employee representative shall in good faith bargain with each other. By this we do not intend that either shall ever be compelled "to agree to a proposal" or make "a concession."

Yet the Board now desires this Court to say: Even though the Respondent has otherwise bargained in complete good faith, nevertheless by refusing to agree to the proposal and make the concession of furnishing its financial records to the Union, automatically the Respondent has violated the National Labor Relations Act.

It is submitted that the ruling which the Board seeks, instead of implementing, would reverse what was written into the Statute and, instead of fulfilling, would explicitly disobey the expressed will of Congress.

This has been heretofore clearly recognized by this Court. In a case where, as here, the Board contended that the employer's taking of a certain position in bargaining was, *per se*, and as a matter of law, violative of the Statute, this Court said:

"As amended in the Senate and passed as the Taft-Hartley Act, the good faith test of bargaining

was retained and written into Section 8 (d) of the National Labor Relations Act. That Section contains the express provision that the obligation to bargain collectively does not compel either party to agree to a proposal or require the making of a concession."

"Accordingly, we reject the Board's holding that bargaining for the management functions clause proposed by Respondent was, *per se*, an unfair labor practice."

National Labor Relations Board vs. American National Insurance Company, 343 U. S. 395, 409.

The Extraordinary and Indefensible Implications of the Board's Ruling

Turning now to an analysis of the meaning and implication of what the Board seeks, it is to be seen that there is apparently no limit to the financial information which a Union could require of an employer under the Board's contentions. The complaint in this case alleges that the Respondent violated the Act in that it failed to furnish to the Union its "books, records, statistics, manufacturing costs, dividend records, financial data and other information." As has been hereinabove noted, the Union's written demand upon the Company was that the Union be furnished or given access to "full and complete information with respect to (the Company's) financial standing and profits," including "evi-

dence as to dividends paid by the Company during the past ten years and the breakdown of its manufacturing costs" (R. 5-6).

At the hearing before the Board's Trial Examiner, upon the Board's chief witness being questioned on this issue, he testified (R. 82):

> " . . . If it took the complete records, profits, dividends, manufacturing costs, or what have you, anything, relating to the Company's inability to grant more money, then I think it should have been made available to (the Union's) Accountant that was to examine the books."

Similarly, the Board contends that the Respondent "was required to grant the Union's request for 'full and complete information and evidence of (the Company's) financial status' " (Board's brief in the Court below, p. 11). The Board further declared that the Union was entitled to an examination of the Company's "profit, costs and other financial data" (Board's brief in the Court below, p. 13).

Likewise in its brief before this Court, the Board urges that the Union is entitled to "full and complete information and evidence of the Company's financial status" (Board's brief, p. 23) and to "an examination of profit, cost and other financial data in addition to wage levels" (Board's brief, p. 24) and to a disclosure by the Company of "its 'profit in regard to sales and costs,'

its capitalization, and its cost and price structure upon which its competitive bidding was computed" (Board's brief, p. 22).[5]

In the light of all these specifications in the complaint, in the Union's demand upon the Respondent, in the testimony of the Board's witnesses and in the Board's briefs in the Court below and in this Court, no other conclusion is possible than that the ruling of the Board, which it now asks this Court to approve and enforce, has no identifiable limits and that the general words of the Board's order "statistical and other information" do indeed encompass "full and complete information and evidence" derived from the Company's "complete records" as to its "capitalization," its "sales," "its costs," its "manufacturing costs," "its cost and price structure upon which its competitive bidding was computed," "its profit in regard to sales and costs," its "dividends" and its "financial standing."

The Respondent submits that if it should now be held that a wage demand creates an automatic legal right to all such information as this, no matter in what good faith an employer otherwise bargains and acts, it would indeed be with general consternation that employers the country over would learn that such is the law.

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[5] Elsewhere in its brief (p. 25) the Board ironically declares that it "of course" will not impose any "unreasonable burden" upon an employer in respect to the financial information which it will require of him.

It has not heretofore been supposed that upon an employer bargaining upon a wage increase for his employees, he must disclose how much money he has in the bank, and what and where are all his assets and his liabilities, his revenues and expenditures, his profits and his losses.

Nor is the matter simply one of interest in privacy as a matter of principle. For example, to thousands of companies in keen competition throughout the land, the privacy of manufacturing cost data is a highly valuable and guarded asset. Compulsorily to remove such privacy is to destroy this asset. If it were the law that such could be accomplished merely by the making of a wage demand, as the Board now contends, many wage demands would be made for no other purpose whatever than to obtain all the information which the Board says must then be disclosed.

Likewise, in the case of genuine wage demands, information such as is here at issue would often be requested with no purpose in mind save that of pressure upon the employer, that is, that the employer might grant the wage demand rather than make public its confidential financial data. As is observed in the opinion of the Court below, "demand for examination of books could be used as a club to force employers to agree to an unjustified wage rate rather than disclose their financial condition with such confidential matters as manufacturing costs."

It is submitted that the Board's *fiat* in this case is indeed a giant stride toward the economic transformation

of this Nation and that this Court should not place its seal of approval upon such a decree.

Upon further analysis of the Board's ruling, it is to be seen that in still further respects it is untenable. The Board's order directs the Respondent to furnish such information "as will substantiate the Respondent's position" (R. 65).

Immediately the questions arise: What is meant by "substantiate," and to whose satisfaction must the Respondent's "position" be substantiated, and what is the consequence if the information furnished fails to "substantiate?"

The Respondent's "position" was that it would agree to a 2½¢ an hour wage increase but would not agree to a 10¢ an hour increase. To "substantiate" this position must the Respondent *prove* that it *ought* not to be required to increase wages more than 2½¢ per hour? Certainly the Respondent is not to be required to prove this to the satisfaction of the Union. The only alternative then would be that the Respondent must so "prove" to the satisfaction of the Board and the Courts. But until now it has never been contemplated that the National Labor Relations Act empowers either Board or Courts to sit in judgment on any issue as to whether an employer should grant a certain wage increase or any wage increase.

Let us assume, contrary to what the record indicates, that "full and complete information" from the Respondent's books and records would show that the Respondent

had large cash funds lying idle in the banks. Could the Board and the Courts thereupon adjudge that the Respondent was in bad faith in refusing to agree to a 10¢ an hour wage increase? Any such adjudication would obviously be forbidden by the explicit statutory provision that no one may be held to be in bad faith, or to have failed to bargain in good faith, because of his refusing to agree to a proposal or make a concession—to say nothing of the general proposition that the Respondent would be entitled to its own opinion, and to adhere to its own opinion, as to what funds would or would not be needed in the operation of its business.

Even if it were within the province of the Board or the Courts to adjudge that the Respondent's information *proved* that it *could* grant a 10¢ increase, still such a determination would lead nowhere. For under the Act neither the Board nor the Courts could thereupon order the Respondent to abandon its position and grant the requested increase.

From all of which it is abundantly clear that with this case the Board is inviting the Court to follow it into a legalistic quagmire in which no logical footing is to be found anywhere. It is submitted that the Court should decline to accompany the Board on any such expedition.

Analysis of the Board's Arguments

The central theme of the Board's argument, reiterated throughout its brief, is that the circumstance which created a right on the part of the Union to look at the Company's books was the Company's statement that it was *unable* to grant the requested wage increase.

Actually, in the negotiations, as hereinabove shown, the Company stressed its fear of getting its wage structure above that of its competitors far more than it did its inability to make the increase. Apart from this, however, the Board would seem to be completely unsound in attributing crucial or catalytic significance to the employer's use of the word "unable."

It must, of course, be agreed on all sides that the Company's refusal to grant more than the 2½¢ increase was based on "economic" considerations. And it is indeed difficult to understand why the ruling on the question here at issue should be any different whether the Company took the position that because of economic considerations it was *unable* to grant the requested increase, or whether the Company took the position that because of economic considerations it was *unwilling* to grant the requested increase. In either event, the Company grounded its position on economic considerations. Nor indeed would it seem that negotiations with respect to wages would ordinarily revolve around anything other than economic considerations.

The Board's argument would seem to come to the remarkable proposition that in negotiation upon a wage increase, so long as the employer stays away from a plea of financial inability and grounds any refusal of increase upon unwillingness, for that his competitors have not granted such an increase and the like, he need not open his books to the Union—but that if during the negotiations he should make any statement that he is financially unable to grant the increase, then magical words have been spoken and forthwith, upon request, he must furnish his books and records to the Union.

Another basic tenet of the Board's argument, emphasized throughout its brief, is that in negotiation upon a wage demand, unless the employer furnishes his books and records to the Union, the Union has "to negotiate in the dark" and that this constitutes "an insurmountable barrier to successful conclusion of the bargaining" (Board's brief, pp. 9, 13, 28). The contention that there can be no "successful" bargaining unless the employer opens his books to the Union is belied by the very fact, noted above, that the parties here involved thrice arrived at mutually agreeable contracts without any such opening of the Company's books.

Such a contention is more broadly and conclusively refuted by the plain fact that for some twenty years there has been very effective bargaining under the Act with respect to wage demands, resulting in thousands upon thousands of agreements and contracts, without employers having been legally compelled to furnish their

books and records to the Unions with which they were bargaining.

As to the Board's lament that without the employer's records the Union must "negotiate in the dark," it seems not to occur to the Board that most bargaining in all realms of the economic world is "in the dark" in the sense that neither of the bargainors is usually in possession of "full and complete information" as to the financial pressures or strengths or weaknesses of the other side. The bargainor who obtains such information obviously gains a very great advantage. Surely the hand of Government should not now be laid on the scales to add, by legal compulsion, this crucial advantage to the vast power which labor Unions already have in the field of collective bargaining.[6]

Nor does it appear likely that the investiture of labor Unions with this new legal power would further "industrial peace" as the Board contends (Board's brief, pp. 9, 14). Strikes, like other positive steps by a bargainor, are undoubtedly often foregone because of risk arising out of uncertainty as to the exact strength or weakness of the other side. If there were no such risk to the Unions, factual certainty being supplied to them by legal com-

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[6] Since the Board would require the employer to disclose in detail his financial affairs in order that it may be "seen" whether or not he is "able" to grant a wage increase, would the Board also require the employees to disclose in detail their financial affairs in order that it may be "seen" whether they are "able" to get along without a wage increase?

pulsion upon the employers, they would very likely embark upon many strikes which otherwise they would refrain from undertaking.[7]

As to authority for its position, the Board does not contend that any Court has made such a ruling as it seeks from this Court, save only the Court of Appeals for the Second Circuit in the case of *National Labor Relations Board vs. Jacobs Manufacturing Company*, 196 F 2d 680. Upon study of the *Jacobs* case, however, it will be seen that the question here at issue was only incidentally dealt with in that case. Language in the *Jacobs* case which the Board now relies on would seem to have been *obiter dictum*, the Court in that case having upheld the Board's finding that the Respondent there had failed to bargain essentially in that such Respondent "took the position that discussion of wage increases would be futile" and "refused to discuss the other subjects at all" or to attend "further" bargaining meetings. *National Labor Relations Board vs. Jacobs Manufacturing Company*, 196 F 2d 680, 683 (C. A. 2).

Indeed the petition before this Court concedes (Petition p. 8) that the employer in the Jacobs case "had refused to discuss pension plans with the Union" and that thereby completely sufficient grounds for a Court

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[7] To be sure, as the Board points out (Board's brief, p. 17), employers are often entirely willing to furnish full information to the Unions respecting their financial affairs. The issue here, however, is not what they may choose to do as a matter of free collective bargaining but what they must do as a matter of law.

decree supporting a finding of violation of "Section 8 (a) (5) of the Act" had been established, apart from any issue of refusal to furnish information.

The Board refers also to the case of *National Labor Relations Board vs. Whitin Machine Works*, 217 F 2d 593 (C. A. 4), which, like the present case, was decided by the United States Court of Appeals for the Fourth Circuit. But as pointed out by that Court in the present case:

> "There is nothing in our decision in *N. L. R. B. v. Whitin Mackine Works*, 4 Cir., 217 F 2d 593 which supports the order of the Board. That case had to do with furnishing information as to wages paid the employees,[8] information which the company here offered to furnish, not with dividends, manufacturing costs or the general financial condition of the employer."
>
> *National Labor Relations Board vs. Truitt Manufacturing Company*, 224 F 2d 869, 874 (C. A. 4).

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[8] Such also were the cases of: *Aluminum Ore Co. vs. National Labor Relations Board*, 131 F 2d 485 (C. A. 7); *National Labor Relations Board vs. Yawman and Erbe Manufacturing Co.*, 187 F 2d 947 (C. A. 1); *National Labor Relations Board vs. Hekman Furniture Co.*, 207 F 2d 561 (C. A. 6); *National Labor Relations Board vs. The Item Co.*, 220 F 2d 956 (C. A. 5), certiorari denied, 350 U. S. 836; *Boston Herald Traveler Corp. vs. National Labor Relations Board*, 223 F 2d 58 (C. A. 1).

It is thus to be seen that no Court has made a definitive ruling such as the Board now asks for and the Respondent urges, for the reasons herein set forth, that this Court should not do so.

The Board, in its brief, quotes and seems to rely very considerably on various articles written by "students in the field of labor relations" (Board's brief, pp. 17-20). The Respondent, of course, does not have, nor as the Court, any means of knowing what circumstances and factors may shape the conclusions of authors and commentators in this controversial field. And it is hard to believe that the Court would give any weight whatever to "views" so expressed in any direction. Certainly the Court realizes that expertise may be but a disguise or bias and that what passes as learned discussion is often in reality sophisticated propaganda.

Upon all of the foregoing it is submitted that the contention of the Board has in truth no tenable support, either of authority, logic or right.

Conclusion

For the reasons and upon the grounds herein set forth, the Respondent urges that this Court should not make the ruling which the Board asks it to make and that the judgment of the Court below should be sustained.

Respectfully submitted,

R. D. DOUGLAS, JR.
WHITEFORD S. BLAKENEY
Attorneys for the Respondent

Of Counsel:
DOUGLAS, DOUGLAS AND RAVENEL
BLAKENEY AND ALEXANDER